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BEFORE THE ARIZONA CORPORATION COMMISSION 3 P 4:43

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AZ CORP COMMISSION
DOCUMENT CONTROL

IN THE MATTER OF THE APPLICATION OF
ARIZONA PUBLIC SERVICE COMPANY FOR
AN ORDER OR ORDERS AUTHORIZING IT TO
ISSUE, INCUR, OR ASSUME EVIDENCES OF
LONG-TERM INDEBTEDNESS; TO ACQUIRE A
FINANCIAL INTEREST OR INTERESTS IN AN
AFFILIATE OR AFFILIATES; TO LEND MONEY
TO AN AFFILIATE OR AFFILIATES; AND TO
GUARANTEE THE OBLIGATIONS OF AN
AFFILIATE OR AFFILIATES

DOCKET NO. E-01345A-02-0707

Arizona Corporation Commission

DOCKETED

OCT 08 2002



**REPLY TO ARIZONA PUBLIC SERVICE COMPANY RESPONSE TO
MOTION TO INTERVENE**

On September 16, 2002, Arizona Public Service Company's ("APS") filed its Application in the above-captioned docket. Far from being a simple financing matter, APS seeks Commission authorization to, among other things, acquire a financial interest or interests in an affiliate or affiliates. So there is no misunderstanding, those affiliates are PWCC, APS's parent, and PWEC, the owner of two merchant power plants that will compete with other merchant generators for the contestable portion of APS's Standard Offer Service load as identified in Decision No. 65154 and to be fully determined in the Track B proceeding. APS itself acknowledges that its Application is not simply a request to borrow a few bucks. Rather, it is "evidence of the Company's continued desire to find a solution to the need to permanently recapitalize the financing of the PWEC Assets, as was discussed at great length by the Commissioners during the August 27th Special Open Meeting that resulted in Decision No. 65154." Application at 6 [emphasis added, footnote omitted].

Panda Gila River, L.P., ("PGR") was an intervenor and active participant in the proceedings that led to Decision No. 65154 and was also an active participant in the August 27th

1 discussions referenced in APS's Application. As part of those discussions, PGR counsel
2 identified a number of issues that had to be addressed during any hearing on an APS attempt to
3 "unify" the generation assets owned by PWEC with those owned by APS. The Commissioners
4 did not express objection to those issues and the proceeding actually broke for a short time so
5 that the parties, including PGR, could craft language relating to the unification issue. It is this
6 language that APS cites on page 2 of its Application where it "requests that the Commission's
7 Hearing Division issue a Procedural Order, as called for by Decision No. 65154 (September 10,
8 2002) . . ." Application at 2. The Commissioners expressed no objection to what was PGR's
9 clearly expressed intention to participate in whatever unification effort APS came up with in
10 response to the Order. It is simply disingenuous for APS to suggest that it is pursuing the
11 Application called for by Decision No. 65154, to address issues raised by the Commission's
12 decision in that proceeding, yet suggest that parties the Chief Administrative Law Judge already
13 determined have a substantial interest in that proceeding and a right to intervene, suddenly have
14 no interest in a proceeding that largely would have the same result.

15 APS's argument is made even more disingenuous by the fact that APS argued, and
16 through its rehearing request continues to argue, that the issue of financing for its merchant
17 affiliates in the absence of divestiture was a Track A issue. At the August 27th Special Open
18 Meeting, APS argued that the Commission should rule on this issue in the Track A Order as the
19 merchant intervenors had the right to cross-examine APS witnesses and present testimony on the
20 subject at the Track A proceeding. The Commission rejected that approach and called for a
21 separate proceeding. APS now asserts that neither the merchant intervenors, nor apparently
22 anyone else, have the right to present testimony or question its witnesses before it takes a
23 financial stake in an affiliate. APS simply must not be permitted to have it both ways. Its
24 Application and response to intervention both make it clear that this docket is inextricably
25 intertwined with the generic proceeding, and, only is necessitated by the outcome of that
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1 proceeding. As a party to that proceeding, PGR has already been determined to have interests
2 that are directly and substantially affected by the generic proceedings and it should be considered
3 res judicata that PGR and the other merchant intervenors have interests that will be directly and
4 substantially affected by a proceeding that APS argues is not only a direct result of the prior
5 proceeding but specifically discussed and authorized by that proceeding.

6 Even if the issue is not considered res judicata, PGR's interests clearly have the potential
7 to be directly and substantially impacted by APS's Application. First, the Commission has
8 ordered APS to acquire certain amounts of power from the competitive market. PGR and the
9 other merchant intervenors have spent significant time and effort, along with Staff, the
10 Commission and multiple other parties, to develop a procurement process, addressing such issues
11 as affiliate code of conduct, credit and deliverability. The Application has the potential to affect
12 each and every one of those areas in a direct and substantial way and thereby affect PGR's rights
13 in a direct and substantial way.

14 The most obvious direct and substantial effect is APS's credit-worthiness. In particular,
15 PGR and others similarly situated have a substantial interest in developing for the record the
16 effect on APS's credit rating of lending half a billion dollars to a 100% merchant plant portfolio
17 given that APS will be a counter-party under any competitively procured power contracts. If
18 APS's credit rating is diminished as a result of its "loan" to its affiliate, it may no longer be a
19 viable commercial counter-party. APS has spent substantial time at the Track B proceedings
20 ruminating about the credit strength of merchant intervenors. Credit-worthiness is a two-way
21 street, however. If APS is not able to retain a commercially acceptable credit rating as a result of
22 its financial support of its affiliate, then the competitive procurement ordered by the Commission
23 would fail as would the wholesale market. There should be no mistake, this is not an
24 "expansion" of the proceeding. Rather, it is simply part of the public interest finding the
25 Commission is required to make as the Commission has already determined that competitive
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1 procurement is in the public interest. The proposed financing simply has the ability to infect
2 every aspect of competitive procurement and those parties who have fought to have competitive
3 procurement have a direct and substantial interest in making sure that procurement is not affected
4 by the Application. If APS believes, and can show the Commission, that there will be no such
5 effect, the hearing should be quick and painless.

6 APS is also off base when it argues that PGR is "assuming the unfamiliar role of
7 consumer advocate" and that those interests can be addressed by Staff and RUCO. PGR is a
8 consumer, an APS ratepayer for a variety of commercial needs at the facility which will increase
9 as the facility becomes operational. PGR is not, however, a residential consumer and thus its
10 interests are not RUCO's concern. While PGR has faith that Staff will do an excellent job of
11 addressing APS's Application in accordance with its statutory mandate, Staff's involvement in a
12 proceeding also is not a substitute for an affected party's involvement. If that were the case,
13 intervention would never be allowed for any ratepayer or party other than Staff. As an APS
14 ratepayer whose interests are not represented by any other party, PGR has a direct and substantial
15 interest in the proceeding which, contrary to APS's argument that PGR is an improper consumer
16 advocate, standing alone would provide a basis for granting the requested intervention.¹

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19 ¹ APS tries to downplay the ratepayer role in addressing its financing application by arguing in
20 its objection to intervention that the "approval of the financing does not imply any specific rate-
21 making treatment of either the financing itself or for any use of the proceeds therefrom." APS
22 Response to Intervention at 4. In a footnote APS apparently takes the position that this
23 Commission should follow a California like path of "implement now and ask questions later" by
24 asserting that any potential rate impact is hypothetical and premature. These assertions miss the
25 mark and obfuscate the real issue. The issue for this Commission to address is whether the
26 proposed Application is in the public interest. The only way for the Commission to make such a
finding is to understand the potential ratemaking implications of its decisions, all potentials, and
their likelihood of occurrence, not to wait until the regulated utility is in bankruptcy and the state
is buying power. As a ratepayer of APS, PGR, like other ratepayers, has a direct and substantial
interest in assuring that the Commission has all the appropriate information to make its public
interest finding and entities which would be directly and substantially affected by such a finding
should be permitted to intervene.

1 It is well settled Arizona law that the right to intervene should be liberally construed.
2 *Bectel v. Rose*, 150 Ariz. 68, 772 P.2d 236 (1986) (intervention "is remedial and should be
3 liberally construed with the view of assisting parties in obtaining justice and protecting their
4 rights.") (citations omitted). The fact that APS's response does not cite Arizona Commission
5 cases rejecting intervention is a testament to Arizona's policy of liberally addressing
6 intervention. As noted above, PGR has been an intervenor and an active participant in each of
7 the Commission's pending dockets concerning electric competition. Suffice it to say, any
8 decision by the Commission to allow, partially allow, or even disallow, APS's request, will have
9 a "direct" and "substantial" impact on electric restructuring and intervention is therefore
10 appropriate. *See* A.A.C. R14-3-105 ("Rule 105").

11 Recognizing a lack of Arizona law in its favor, APS cites to cases from other jurisdictions
12 for the proposition that intervention is inappropriate in this case. These three cases are
13 distinguishable and provide no precedential or even persuasive value. For example, in *In Re Ohio*
14 *Power*, 148 P.U.R. 4th 447 (1993), APS correctly points out that both interveners had an interest in
15 the financial impact of Ohio Power Company's ("OPC") financing strategy. However, the denial
16 of intervention was based more on the status and desires of the two interveners than on the merits of
17 their intervention rights. One, the Industrial Energy Consumers ("IEC"), was a consumer group
18 concerned about the possible impact the financing terms would have on the future rate base
19 calculations by the utility. The second, the Sierra Club was concerned with the whether OPC
20 would be able to comply with certain environmental regulations due to the obligations created as a
21 result of the financing application. The Commission noted that both interveners could and should
22 litigate their concerns in subsequent proceedings and that "protracted proceedings on the financing
23 application [were] in nobody's interest." *Id.*

24 First of all, in this case there are no other proceedings. In this case, the heart of the
25 proceedings precipitating APS's Application were to develop wholesale competitive markets in
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1 Arizona. The Commission is further required to make a finding that APS request is in the public
2 interest, a finding that requires a determination that the Application does not unduly burden or skew
3 competition the Commission has already said is in the public interest. Thus, unlike *Ohio Power*,
4 participation by competitors and consumers in this proceeding *at this time* is in everybody's
5 interest. Delay will simply exacerbate any problems not addressed up front.

6 As with the *Ohio Power* case, APS's citation to this next case is also misleading. While it
7 is true that the Commission found that "[t]here is no 'right' to intervention", the Commission based
8 its rationale on the fact that the asset recovery acceleration was "not [the] type of proceeding which
9 call[ed] for extensive participation." See *In the Matter of the Petition of GTE Northwest*
10 *Incorporated for Depreciation Accounting Changes*, 1997 WUTC LEXIS 25 (1997). APS is not
11 simply seeking to accelerate asset recovery, but rather, to enter into a nebulous financial transaction
12 with a merchant generation affiliate where it will incur half a billion dollars in additional liabilities
13 and take a financial interest in the merchant affiliate at the very time it is required to competitively
14 procure its power needs. A transaction which is sure to have a direct and substantial impact on, not
15 only the competitive markets that this Commission has been trying to define and build for the past
16 few years, but also the ratepayers of Arizona.²

17 Finally, although the Florida Commission did hold that economic damages alone do not
18 constitute a "substantial interest,"³ there is much more at stake in the instant proceeding than
19 economic damages to PGR. As stated by PGR and the other merchant intervenors previously, there
20 is a substantial interest in ensuring that the APS application does not adversely "affect the amount,
21

22 ² This, and other commissions have carefully scrutinized affiliate transactions in the past. See,
23 e.g., *Tucson Electric Power Company*, Decision No. 59224 (1995) (applying higher of market or
24 cost pricing standard for affiliate transactions); *San Diego Gas and Electric Co.*, 166 PUR 4th
25 276 (Ca. Pub. Util. Comm'n 1992) (same); *Duke/Louis Dreyfus L.L.C.*, 73 FERC ¶ 61,309 at
61,868-69 (1995) (discussion FERC's intraffiliate transaction rules).

26 ³ See *In Re: Petition Monsanto Company for a Declaratory Concerning the lease Financing of a*
Cogeneration Facility, 1986 Fla. PUC. LEXIS 351 (1986).

1 timing, and manner of the competitive procurement process.” *See* Commission Decision No.
2 65154 (Track A Order, p. 33, l. 10-14). Unlike the Florida situation cited above, APS’s
3 Application and subsequent financing scheme will have a direct impact on other proceedings to
4 which PGR and the other merchant’s already are a party. Far more than an economic interest, PGR
5 and the other merchants have an interest in protecting the competitive procurement process. PGR is
6 here to protect the right to compete, a right the Commission has already recognized as being in the
7 public interest.

8 Finally, the Commission should reject APS’s unfounded assertion that PGR’s
9 involvement will unduly broaden these proceedings. PGR has no reason to waste the
10 Commission’s time by responding to wholly unfounded and inappropriate assertions about
11 PGR’s conduct in prior proceedings. APS clearly knows the way to the Commission if it
12 believes any discovery request or other action by another party is inappropriate or outside the
13 scope of issues. The fact that there were no such rulings in the extensive prior proceedings
14 speaks for itself.

15 PGR will respond, however, to APS’s assertion that “during the Procedural Conference
16 on September 24, 2002, Panda/TECO and some of the Track B Merchant Intervenors raised the
17 new issue of whether the APS financing application could result in an ‘unfair competitive
18 advantage’ to the Company’s affiliates.” This is false. What PGR pointed out is that APS’s
19 Application raises that issue because it repeatedly makes assertions about its competitive
20 situation and the competitive impact of the financing. *See* Application at 4-7. If PGR learned
21 anything from APS’s Track A behavior, it is that PGR must affirmatively address every assertion
22 made in an APS pleading, whether clearly erroneous or irrelevant, as APS will assert that the
23 information was accepted by others if they do not challenge such assertions. PGR raised
24 nothing at the procedural conference that was not in APS’s Application.
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1 As PGR stated at the September 24th Procedural conference, the relevant Arizona statutes
2 tell us what areas of inquiry are relevant. A.R.S. §§ 40-285 and 40-301 and A.A.C. R14-2-804
3 each require the Commission to make specific findings. Those requirements set the parameters
4 of the hearing and the ALJ can closely monitor the proceeding to make sure that the inquiry is
5 not being expanded beyond the appropriate scope necessary for the Commission to make the
6 statutorily required findings.

7 For the reasons outlined above, PGR respectfully requests that the Commission grant its
8 Motion for Leave to Intervene in this matter.

9
10 Dated: October 3, 2002

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